

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TAMMY DOERING)	
Claimant)	
VS.)	
)	Docket No. 1,041,593
GGNSC WAKEFIELD, LLC)	
Respondent)	
AND)	
)	
INSURANCE COMPANY OF)	
THE STATE OF PENNSYLVANIA)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) appealed the October 31, 2008, Preliminary Hearing Order entered by Administrative Law Judge Rebecca Sanders.

ISSUES

Claimant alleges she injured her back on November 28, 2007, while working for respondent. In the October 31, 2008, Order, Judge Sanders granted claimant's request for temporary total disability benefits.

Respondent contends Judge Sanders erred by finding that claimant sustained an accidental injury that arose out of and in the course of her employment with respondent. Respondent argues claimant failed to present medical evidence that related her back condition to her work and that the Judge should not have relied upon claimant's testimony as she is not credible.

Next, respondent contends the Judge erred by considering the medical report of Dr. Lynn A. Curtis, who evaluated claimant at her attorney's request. Respondent argues in its brief to the Board that the report should not have been admitted into evidence as claimant failed to provide respondent's attorney with a copy of the report before the preliminary hearing. In addition, respondent maintains the medical report should not have been admitted as it neither addressed claimant's preexisting back condition nor causation and, therefore, the report did not comprise substantial or satisfactory evidence. In summary, respondent requests the Board to reverse the Preliminary Hearing Order.

Conversely, claimant contends the Preliminary Hearing Order should be affirmed. Claimant argues Dr. Curtis did address the cause of claimant's present back condition and that the doctor's opinion regarding that issue is uncontradicted. Claimant also contends the Board does not have jurisdiction at this juncture of the claim to address the issue of whether the Judge erred by admitting Dr. Curtis' report into evidence. In the alternative, claimant argues the Judge did not abuse her discretion or act outside the scope of her authority by admitting the medical report.

The issues before the Board on this appeal are:

1. Did claimant injure her back in an accident at work on November 28, 2007, which arose out of and in the course of her employment with respondent?
2. Did the Judge err by admitting the medical report of Dr. Lynn A. Curtis?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds as follows:

Claimant is a licensed practical nurse who began working for respondent in September 2006. She testified that on November 28, 2007, she fell at work when her feet got tangled with an oxygen tank. Claimant testified, in part:

I went in to a resident's room to set up a nebulizer treatment, and I walked up to his table. I set up the treatment and I turned around to walk away and he had an E cylinder oxygen tank setting at the end of the table in a cart, and somehow I got tangled up in that thing and I landed on the floor and it landed on the small of my back.¹

Claimant's testimony is uncontradicted that she reported her accident to respondent's weekend manager, Sheila Meyers. Also, claimant's testimony is uncontradicted that she prepared an incident report at Ms. Meyers' direction and presented the report to respondent's administrator, Betsy Lloyd.

The undersigned finds claimant's testimony regarding the accident and incident report is uncontradicted and persuasive. Accordingly, the undersigned finds it is more probably true than not that claimant fell at work on November 28, 2007, as alleged.

¹ P.H. Trans. at 10, 11.

There is no dispute that before her fall claimant had low back problems, which had caused radiating symptoms into her legs. Indeed, in March 2007 claimant received medical treatment for tenderness in her lumbar paraspinous muscles on the right and tenderness in the right sacroiliac region. And in October 2007 claimant likewise received medical treatment for pain in her right hip and right leg. Nonetheless, claimant's testimony is credible that after her fall at work her back began hurting bad enough that she needed to seek medical treatment. Accordingly, claimant sought treatment from her personal physician, Dr. Kelly Yoxall, who sent her for an MRI and then referred her to a neurosurgeon, Dr. Matthew J. Wills.

Within a month or two of the accident, respondent's workers compensation insurance carrier advised claimant it was denying her claim as it believed her problems were due to a prior condition. Nevertheless, Dr. Wills operated on claimant's lower back on March 19, 2008, and fused her fourth and fifth lumbar vertebrae.

Respondent has raised the issue whether claimant's back complaints that led to her March 2008 back surgery were related to her alleged accident at work. Claimant testified that her symptoms worsened after her fall at work. Claimant saw Dr. Yoxall on December 3, 2007. The doctor's records from that date do not mention claimant's fall at work. Instead, those notes are more focused upon the fact that claimant had disc disease in the past and that she was told she had bulging discs at age 32. The doctor indicated claimant's lumbar paraspinous muscles on the right and her right sacroiliac region were normal.

In addition, the January 24, 2008, letter from Dr. Wills to Dr. Yoxall does not mention claimant's fall at work. Dr. Wills wrote, in part:

I saw Tammy Doering in the neurosurgery clinic today. She is a 46-year-old right-handed white female you asked me to evaluate for back and left leg pain. She has had a long history of intermittent back pain and aches. This has been a tolerable condition for her. She has functioned with it. In the past three months she has developed severe pain in her left buttock radiating down her left leg. She has had minor episodes of pain in her left leg for some time but they were relatively minor and resolved. She has occasional pain radiating down her right leg. She has numbness in the lateral aspect of her left foot and in the web space between the first and second toes. Her leg pain is significantly aggravated by standing and walking. She has not been able to work for the past three weeks. She is an LPN, does patient care and spends a lot of time walking and bending and stooping.²

² *Id.*, Cl. Ex. 2.

But in August 2008 Dr. Lynn A. Curtis evaluated claimant at her attorney's request. Claimant told the doctor about her fall at work as the doctor noted,

On 11/28/07 [claimant] was giving one of the resident [sic] a nebulizer treatment. She turned to walk out and her leg got tangled in an E-cylinder cart. The handle of the cart struck her in the back.

She fell face down on the floor. She got up and her back immediately hurt.

She kept going with her shift. However, her back got worse and she developed significant left leg pain.

She told Sheila Meyers, her weekend manager. Initially, Ms. Doering filled out an incident report. She finished her shift.

She says she could hardly walk due to sharp pains in her back and pains radiating into her left foot. She said she walked 30 feet and then had to stop.

Not until December 2007 did she get an MRI ordered by Dr. Yoxall. She was told to do no walking for 2 weeks. She was not allowed to have any epidurals for her pain.

She then finally saw Dr. Wills under her private insurance in January 2008. This is after her daughter, who was very concerned about her, took her to the Manhattan Emergency Room in January 2008. The ER told her she needed to see a Neurosurgeon and gave her Oxycodone.

When she saw Dr. Wills on 01/24/08 he told her she was unstable at L4-5 in her back. Her [sic] told her she needed surgery to decrease the leg pain and stabilize the back.³

Based upon the doctor's evaluation, Dr. Curtis diagnosed the following: status post fall at work; SP lumbar fusion on March 19, 2008, L4 to S1; aggravation of spondylolisthesis at L5/S1, now grade 2; aggravation of lumbar degenerative disc disease; left L5 nerve root injury; lumbar spine instability at L4 on L5; residual L5 radiculopathy, motor and sensory left; and left SI joint injury. The doctor specifically noted one of the purposes of his evaluation was to determine whether claimant had any injury due to her November 2007 fall.

The undersigned finds the greater weight of the evidence presented to date establishes that it is more probably true than not that claimant's fall at work aggravated her

³ *Id.*, Cl. Ex. 1.

low back and led to her March 2008 low back surgery. Although certain medical records do not mention the fall, the undersigned is not persuaded that claimant has testified falsely. An injured worker's entitlement to benefits should not be based upon the acumen of medical personnel in taking a worker's medical history or the skill of a transcriptionist.

In summary, the undersigned affirms the Judge's finding that claimant injured her back working for respondent in an accident that arose out of and in the course of her employment with respondent.

Respondent has also raised the issue whether the Judge erred by admitting Dr. Curtis' medical report into evidence. Although it is noteworthy respondent's counsel, who did not enter his appearance in this claim until after Dr. Curtis evaluated claimant, could not say whether either respondent or its insurance carrier received such report, that issue is not one that is subject to appeal from a preliminary hearing order. As noted by respondent, the Board's jurisdiction to review preliminary hearing orders is limited to allegations that the judge has exceeded his or her authority and, in addition, to the following issues:

- (1) did the worker sustain an accidental injury,
- (2) did the injury arise out of and in the course of employment,
- (3) did the worker provide the employer with timely notice and with timely written claim, and
- (4) do certain other defenses apply.

And the term "certain defenses" refers to defenses that dispute the compensability of the injury under the Workers Compensation Act.⁴

The undersigned finds the Judge did not exceed her jurisdiction by admitting Dr. Curtis' medical report and, therefore, the Board does not have jurisdiction over that issue.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted

⁴ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

⁵ K.S.A. 44-534a.

by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned affirms the October 31, 2008, Preliminary Hearing Order entered by Judge Sanders.

IT IS SO ORDERED.

Dated this ____ day of December, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Stephen P. Doherty, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge